Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE: J. CLEMILLE SIMON

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

1. QUESTIONS PRESENTED:

In this case petitioner has been charged with ethics violations, ironically for seeking to promote judicial ethics. Significantly, with respect to nearly all of the charges more "fact finders" involved in this process found no violation and recommended that all charges be dismissed, than did. Succinctly, plaintiff has been charged with making "knowing false statements of fact" relative to truthful allegations in a Motion to Recuse and an "assignment of error" and "hypothet" in an Appellate Writ application. In finding a violation, the Louisiana Supreme Court rejected the factual findings of the Hearing Committee and Disciplinary Board.

The Louisiana Supreme Court ignored the time honored "manifest error" standard of review and function of the Hearing Committee and Louisiana Disciplinary Board thereby rejecting the factual findings of its "eyes and ears", the Louisiana Hearing Committee (who actually saw and heard the witnesses and evidence) who found "identifiable evidence" warranting petitioner's recusal efforts and the factual findings of the Louisiana Attorney Disciplinary Board who found no violation warranting discipline and recommended that all charges be dismissed, one board member stating in a concurring opinion that it was "nonsense" to suggest a violation and that he was "more shocked" by the judicial behavior evidenced in the case. As a result, the Louisiana Supreme Court, in a split decision, has held that the Freedom of Speech embodied in the First Amendment does not apply to a lawyer's truthful allegations about a judge's perceived misconduct in seeking the judge's recusal. In ignoring the function of the Hearing Committee and Louisiana Disciplinary Board and the "manifest error" standard of review, the Louisiana Supreme Court, in a split decision, has equally held that Fourteenth Amendment Due Process also does not apply to lawyers, rendering the Louisiana Disciplinary Process a futile and costly exercise. Significantly, the Louisiana Supreme Court's rejection of

the factual findings of the Hearing Committee and Disciplinary Board that petitioner did not engage in misconduct warranting discipline rendered the entire process meaningless, costing petitioner in excess of $100,000.00 to successfully defend against the charges only to have the Louisiana Supreme Court abandon the "clear and convincing" burden of proof and eviscerate the factual findings of the Hearing Committee and Disciplinary Board supported by the overwhelming evidence in the record.

This matter arises from petitioner's efforts in representing clients and seeking recusal of a judge in two different cases (*Simon* and *Councelman* litigations). Both cases involved the same judge and same defense counsel. All of the charges arose as a result of pleadings filed in court and **not** as a result of "out of court" statements.

In the Simon litigation (no relation to petitioner) recusal was sought as a result of the judge's conduct over an eighteen-month period of time. Specifically, among others, the judge denied contradictory motions ex-parte without affording the litigants a hearing, set and decided defense motions while petitioner was out of the country, and made statements on the record and in court minute entries that were false and made in an effort to excuse his conduct. On numerous occasions the 3rd Circuit Court of Appeal granted writs and reversed. At the recusal hearing the judge provided testimony suggesting that on the occasions that he repeatedly denied motions ex-parte or scheduled the defense motions when petitioner was out of the country, he only did so after alleged conference calls between the parties. The judge further denied any knowledge of petitioner ever being out of the country. The judge was instrumental in the disciplinary charges being filed. Throughout the discovery phase of the disciplinary process the judge maintained the accuracy of his prior recusal testimony. Significantly, it was not until the disciplinary trial that the judge testified that no such conferences ever took place and then only after defense counsel testified that such conferences never occurred and the judge's law clerk's testified that the judge knew petitioner was out of the country because she had

personally told him so. The Hearing Committee found demonstrable and "identifiable evidence" substantiating plaintiff's allegations and justifying petitioner's efforts and recommended that the charges be dismissed. The Louisiana Disciplinary Board concurred noting, as did the Hearing Committee, the overwhelming record evidence and that the judge had recanted his prior sworn testimony.

In the Counselman litigation it was learned that the same judge had an attorney/client relationship with defense counsel who was defending against petitioner's client's case. Upon learning of this attorney/client relationship petitioner sought to disqualify defense counsel and recuse the judge/clients from deciding the issue of the disqualification. Petitioner's position was simply that an attorney cannot litigate before his judge/client and a judge/client cannot decide matters involving his attorney. The American Bar Association has published an opinion (Appendix H) critical of such an attorney/client relationship with a judge as have various Louisiana Courts.[1] In defense, it was asserted that the attorney only represented the judge in an "official capacity" and not personally and therefore the motion should be denied. It is important to note that as before in the Simon litigation the judge denied the contradictory motion ex-parte but in denying the motion ex-parte issued a minute entry denying the attorney/client relationship only to later admit to the relationship. Because of the defense of "official capacity" petitioner set forth in a brief to the Louisiana 3rd Circuit Court of Appeal a "hypothet" which was clearly and unmistakably identified as a "hypothet" wherein petitioner depicted the attorney attempting to call his judge/clients and speaking with them only if they were wearing their "official" black robe because as had been alleged as a defense, the attorney only represented the judge in an "official capacity". In other words, if the distinction of "official capacity" was valid then, consequently, there could be no discussions between the attorney and his judge/clients other than in their "official capacity". It was clearly

[1] *State v. Johnson*, 529 So. 2d 157 (la. App. 4th Cir. 1998); *Younce v. Pacific Gulf Marine, Inc.*, 827 So. 2d 1144 (La. 10/4/02).

set forth in the brief that the "hypothet" was designed to expose the frivolity of the "official capacity" defense. In other words, one cannot separate a judge's "official" persona from his "personal" persona because the appearance of impropriety is the same, if not worse, and therefore the distinction of "official capacity" was one that made no legal or practical difference. Notwithstanding that the disciplinary rules are "strictly construed" and notwithstanding that the "hypothet" by definition was fictional, not factual, petitioner was charged with making a knowing false statement of fact, the same charge that was filed against petitioner for the Simon recusal motion.[2] The Louisiana Disciplinary Board not only affirmed petitioner's innocence on all charges but in a concurring opinion one board member further stated that it was "nonsense" to suggest any violation and that he was "more shocked" by the judicial behavior evidenced in the case.

The following questions are therefore presented:

1. Does the Freedom of Speech embodied in the First Amendment apply to lawyers in the exercise of their duties and obligations to clients?

2. Does the right to Due Process embodied in the Fourteenth Amendment apply to lawyers in defense of charges of misconduct?

3. May a lawyer be the subject of discipline for truthful allegations in a judge's recusal motion or artful hypothetical debate relative to an affirmative defense seeking to justify a clearly inappropriate attorney/client relationship between the presiding judge and counsel in the case?

(A) Must a lawyer prevail on a Motion to Recuse to avoid discipline?

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[2] The same charge was made against petitioner for an "assignment of error" in the same Writ Application.

(B) Can a lawyer engage in hypothetical argument?

4. Is it possible to meet the "clear and convincing" burden of proof when the Louisiana Hearing Committee and Disciplinary Board find no violation warranting discipline and the Louisiana Supreme Court Justices cannot all agree?

(A) Doesn't the "clear and convincing" burden require at least some measure of consensus?

5. Is it possible that a lawyer can be found guilty of the charge of making a "knowing false statement of fact" when the allegations are true?

(A) Is it not incongruous to find guilt on the charge of making a "knowing false statement of fact" while at the same time specifically recognizing the absence of a "dishonest or selfish motive?" In other words, if a statement is "knowingly false" is not a "dishonest or selfish motive" implicated?

(B) Is it possible that a lawyer can be found guilty of making a "knowing false statement of **fact**" relative to a hypothet which by definition is fictional?

LIST OF PARTIES

The parties to this proceeding include petitioner and the Louisiana Attorney Disciplinary Board and/or the Louisiana Office of Disciplinary Counsel.

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